No. 82-1058

In the Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATE OF CONNECTICUT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In our petition, we demonstrated that the court of appeals impermissibly intruded on the exclusive constitutional authority of Congress by ordering the Secretary of HHS to pay respondents' claims out of FY 1981 funds notwithstanding Congress' clear instructions that those claims not be paid from "this [FY 1982] or any other appropriation" (Pet. 12-14). We pointed out that neither respondents nor the court of appeals had ever offered any explanation for their refusal to acknowledge the force of Congress' unambiguous language (*id.* at 10-11, 13). Curiously, respondents still have not ascribed any meaning to the phrase "or any other appropriation." Instead, they advance the remarkable, and wholly erroneous, contention that "Congress has never enacted the law relied on by the Secretary, directly or indirectly" (Br. in Opp. 12). Respondents further

contend that, in any event, Congress resolved the controversy over payment of their claims in their favor during the FY 1983 appropriations process (*id.* at 17-18). Respondents are in error on both counts.

1. Respondents argue that Pub. L. No. 97-92 only referenced H.R. 4560 "to determine the 'extent' and 'manner' of the appropriation of *1982 funds*" (Br. in Opp. 13; emphasis in original). Respondents' limited view of Congress' intent in enacting Pub. L. No. 97-92 is based upon a fundamental misunderstanding of the significance of continuing resolutions in the appropriations process.

Continuing resolutions do more than provide "stop-gap" funding necessary to keep the government operating in the absence of regular appropriations acts. Continuing resolutions also are intended to preserve any agreements that Congress has reached during the appropriations process, even if the bills embodying those agreements have not been enacted into law. Stated simply, if a particular provision in an appropriations bill has advanced to a certain point in the legislative process, Congress provides in the relevant continuing resolution that the provision shall be treated as law. Section 101(a)(5) of Pub. L. No. 97-92, 95 Stat. 1185, states this principle in reverse fashion:

> No provision which is included in an appropriation Act enumerated in this subsection but which was not included in the applicable appropriation Act of 1981, * * * shall be applicable to any appropriation, fund, or authority provided in the joint resolution unless such provision shall have been included in identical form in such bill as enacted by both the House and the Senate.

In this manner, Congress preserves its ability to reach compromises when it returns to the regular appropriations process. Thus, for example, when the two Houses are in disagreement about particular amounts, or applicable

terms, conditions and restrictions, a continuing resolution will contain a provision, such as Section 101(a)(3) of Pub. L. No. 97-92, 95 Stat. 1183, specifying that the "lesser amount or the more restrictive authority" shall apply. No such limitation is necessary, however, when the two Houses have already reached agreement.

That is the situation here. Section 208 of H.R. 4560, 97th Cong., 1st Sess. (1981), the provision at issue in this suit, was in fact "enacted" by both the House and the Senate in identical fashion.[1] Therefore, under the principle established by Section 101(a)(5) of Pub. L. No. 97-92, 95 Stat. 1185, Congress understood and intended that Section 208 of H.R. 4560, which bars payment of respondents' claims "from this or any other appropriation," would become law just as surely as if it had been included expressly in Pub. L. No. 97-92, or in a regular appropriations act, or in what respondents refer to as "substantive" legislation (Br. in Opp. 13-14 & nn. 10, 12).[2] Even the court of appeals

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[1]H.R. 4560, including Section 208, passed the House of Representatives on October 6, 1981. See 127 Cong. Rec. H7097 (daily ed. Oct. 6, 1981). The Senate version of H.R. 4560, containing an identical provision, was reported by the Senate Appropriations Committee to the full Senate on November 9, 1981. See 127 Cong. Rec. S13145 (daily ed. Nov. 9, 1981). Section 101(a)(3) of Pub. L. No. 97-92, 95 Stat. 1183, provided that "when an Act listed in this subsection has been reported to a House but not passed by that House as of December 15, 1981, it shall be deemed as having been passed by that House." Thus, H.R. 4560 is deemed to have passed the Senate by virtue of its having been reported out of committee.

[2]Contrary to respondents' suggestion (Br. in Opp. 14 n.12), Congress routinely includes "substantive" provisions in appropriations acts and continuing resolutions, and the House Report indicates that Section 208 of H.R. 4560 was just such a provision. See H.R. Rep. No. 97-251, 97th Cong., 1st Sess. 126-127 (1981). Nor is there any question that substantive legal rights may be affected by means of provisions in appropriations acts. See *United States* v. *Will*, 449 U.S. 200, 222 (1980). Moreover, although the inclusion of a substantive provision in a

readily admitted—as respondents refuse to do—that Section 208 of H.R. 4560 was incorporated into Pub. L. No. 97-92 (Pet. App. 40a-41a & n.36).[3]

As the Court noted in *United States* v. *Will*, 449 U.S. 200, 222 (1980), the sweep of legislative action taken in an appropriations vehicle is determined by reference to congressional intent. Here, the intent of Congress is plain—notwithstanding the time limits set forth in Section 306 of the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 530-531, "prior-period" claims filed more than one year after the fiscal year in which the expenditure occurred are not payable from Pub. L. No. 97-92 "or any other appropriation." Any other conclusion would wholly frustrate Congress' goal because, as we noted in our petition (at 15 n.13), the *only* claims that could have

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"general appropriation bill" is subject to a procedural objection (H.R. Rule XXI.2), no basis for objection exists when the identical provision is found in a continuing resolution. See H.R. Doc. No. 95-403, 95th Cong., 2d Sess. § 835, at 526-527 (1979).

[3]Respondents' position is that a continuing resolution may not affect appropriations other than those necessary during the time period expressly covered by the continuing resolution. But the Comptroller General of the United States has ruled that the general provisions of a continuing resolution must be read to incorporate the more specific provisions of unenacted bills, even when the effect is to extend the scope of the continuing resolution beyond its express terms. For example, in Decision No. B-199966 (Sept. 10, 1980) (reprinted as an appendix to this brief), the pertinent continuing resolution provided that the funds appropriated would remain available until September 30, 1980, at the latest. The incorporated unenacted bill, on the other hand, provided that funds for foreign economic assistance loans would remain available until September 30, 1981. The Comptroller General concluded that the specific terms of the underlying bill should govern over the more general terms of the continuing resolution, even though that had the effect of extending the continuing resolution a year beyond its express terms. Here, too, the fact that Pub. L. No. 97-92 is concerned generally with 1982 monies cannot override the more specific provision in Section 208 of H.R. 4560, which precludes payment of respondents' claims from "any" appropriation.

been affected by Pub. L. No. 97-92 are those involved in this litigation. Respondents' argument thus leads to a totally implausible result: respondents and the court of appeals concede (Br. in Opp. 12; Pet. App. 33a-34a) that Congress enacted a provision prohibiting payment out of 1982 funds of hundreds of millions of dollars in claims, yet they would also conclude that Congress simultaneously created a "loophole" permitting payment of those same claims out of 1981 funds. See *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 631 (1973), quoting *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 489 (1947) (respondents "would * * * impute to Congress a purpose to paralyze with one hand what it sought to promote with the other"). This Court should not sanction such clear disregard for congressional intent.[4]

2. Respondents stand the intent of Congress on its head when they argue (Br. in Opp. 17-18) that "[c]ertiorari jurisdiction ought not be exercised to sustain a position so recently and definitively rejected by the Congress." In fact, Congress has done nothing more than place the matter in abeyance pending a decision by this Court.

Congress undertook consideration of the first continuing resolution for FY 1983—which eventually became Pub. L. No. 97-276, 96 Stat. 1186—after the court of appeals had ruled that respondents were entitled to be paid out of FY 1981 funds. In response to that decision, the Senate Committee on Appropriations proposed language to reaffirm Congress' intent that respondents' claims were not to be paid "[n]otwithstanding the decision of the United States Court of Appeals for the District of Columbia Circuit in

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[4]Contrary to respondents' suggestion (Br. in Opp. 16 n. 14), the significance of this case is not diminished by HHS's initial disallowance of some of respondents' claims. As respondents note (*ibid.*), they may seek review of those disallowances, and we do not interpret their footnote as suggesting a waiver of their right to review.

Connecticut v. *Schweiker*." H.R.J. Res. 599, 97th Cong., 2d Sess. 14 (1982). The committee recommended this language because "the court [of appeals] in its ruling gave inadequate weight to [the] effect on these claims of language that appears in identical form in both the House and Senate versions of the Labor-HHS-Education appropriation bill, H.R. 4560, as incorporated by reference into the last continuing resolution for fiscal year 1982, Public Law 97-92." S. Rep. No. 97-581, 97th Cong., 2d Sess. 14 (1982). The committee further stated that the purpose of its proposal was to clarify Congress' intent that state claims not meeting the one-year filing limitation incorporated by Pub. L. No. 97-92 were to be regarded as "permanently extinguished" (*ibid.*).

When the proposal of the Appropriations Committee reached the floor of the Senate, it was met with vigorous objection from Senators representing the states involved in this litigation. As a result, the Senate adopted alternative language that, after further modification by the Conference Committee, was enacted as Section 136 of Pub. L. No. 97-276, 96 Stat. 1197-1198. Section 136 (set forth at page 3 of the Brief in Opposition) bars payment of respondents' claims out of *any* appropriations during FY 1983. Thereafter, claims "*required to be reimbursed by a court decision*" may be paid, but only following establishment of a schedule for extended payment over a three-year period. Thus, contrary to respondents' assertions (Br. in Opp. 17-18), the language of Section 136 does nothing more than suspend payment of respondents' claims, which could amount to as much as $382 million, pending this Court's review.

That Section 136 did nothing more than place the payment issue in abeyance is clear from the colloquy on the floor of the Senate at the time it was being considered. Even Senator Heinz—whom respondents characterize as the leader of the opposition to the Appropriations Committee's

proposal (Br. in Opp. 15)—acknowledged that the compromise language that became Section 136 was not "intended to prejudice in any way, any court cases involving this matter * * *." 128 Cong. Rec. S12499 (daily ed. Sept. 29, 1982). See also *id.* at S12498 (remarks of Sen. Schmitt); *id.* at S12609 (remarks of Sen. Dole).

In addition to the plain language of Section 136 and the remarks of Senator Heinz and others explaining the limited purpose of Section 136, respondents' position is belied by the Conference Report, which specifically noted "the possibility of Supreme Court review or other court action affecting the eventual payment by the government of these sums." H.R. Conf. Rep. No. 97-914, 97th Cong., 2d Sess. 24 (1982). The report further noted (*ibid.*, emphasis added):

> The language agreed to is not intended to prejudice the outcome of this court case either on behalf of the government or for the States. *The position of the Congress on this issue has already been amply expressed through its action on the fiscal year 1980, 1981 and 1982 appropriations bills and related continuing resolutions.* The amendment is, however, intended to prohibit payment of any of these claims during fiscal year 1983. *If the courts determine that payments must be made*, the language agreed to provides a procedure for orderly payment of claims over a 3 year period beginning in fiscal year 1984.

Respondents thus completely misread Section 136 and its legislative history in arguing that the petition should not be granted because it "seeks only to revive the very proposal that has just been resoundingly rejected by Congress" (Br. in Opp. 17-18). On the contrary, the legislative history of Section 136 not only reflects Congress' understanding that the government might seek review in this Court but also confirms the fact that Congress thought it had already acted

to bar payment of respondents' claims in prior appropriations bills and continuing resolutions, including, of course, Pub. L. No. 97-92. Given both the plain language of Section 136 and its legislative history, it is difficult to understand how respondents find any comfort, much less support for their position, from its enactment.

3. Finally, there is no need for the Court to concern itself with the constitutional question that respondents find lurking in this case (Br. in Opp. 18-19). As we noted in our petition (at 16), this case does not present the question whether respondents have an absolute entitlement to reimbursement or whether, as respondents erroneously phrase the matter, their "valid rights * * * should be obliterated" (Br. in Opp. 12). Respondents sought to have their claims paid only out of FY 1981 funds, and those are the only funds covered by the court of appeals' decision (see Br. in Opp. 8). Respondents cannot seriously contend that the limits of Congress' power under the Spending Clause of the Constitution are in any way implicated by congressional refusal to pay their claims out of a particular year's funds, especially when respondents themselves have, in some instances, delayed as long as 30 years in submitting their claims (see Br. for Appellees 59 & n.6).

On the other hand, this case does raise grave concerns regarding Congress' plenary control over the federal fisc. The court of appeals' refusal to honor Congress' clear direction that respondents' reimbursement claims not be paid out of FY 1981 funds requires correction by this Court.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

FEBRUARY 1983

DOJ-1983-02

APPENDIX

DECISION — **THE COMPTROLLER GENERAL OF THE UNITED STATES WASHINGTON, D.C. 20548**

FILE: B-199966 — DATE: September 10, 1980

MATTER OF: Period of Availability of Foreign Assistance Loan Funds Appropriated by Fiscal Year 1980 Continuing Resolution

DIGEST:

1. Funds appropriated for development assistance loans by fiscal year 1980 continuing resolution remain available for obligation through September 30, 1981. Specific designation in House bill, incorporated by reference in continuing resolution, of two year period of availability of loan funds is exception to general provision in resolution that all funds appropriated thereby are available for only one year.

2. Funds appropriated for foreign assistance for fiscal year 1980 by continuing resolution are subject to limitation that no more than 15 percent of amount of appropriation may be obligated or reserved during the last month of availability.

The General Counsel of the Agency for International Development has requested our opinion on two questions arising under the "Joint Resolution Making further continuing appropriations for the fiscal year 1980, and for other

purposes," Public Law 96-123, 93 Stat. 923 (continuing resolution). First he asks whether funds appropriated for foreign economic assistance loans are available beyond the end of fiscal year 1980. Second, he asks whether the limitation on the percentage of an appropriation which can be obligated in the final month of availability, contained in the fiscal year 1979 appropriation act for foreign assistance (as well in the House-passed foreign assistance appropriations act for fiscal year 1980), applies to funds appropriated by the current continuing resolution.

For the reasons indicated below, we conclude (1) that foreign assistance loan funds appropriated by the continuing resolution are available until September 30, 1981; and (2) that the limit on final month obligations applies to foreign assistance funds appropriated for fiscal year 1980 by the continuing resolution.

Question 1

Section 101(a) of the continuing resolution appropriates:

> "(1) Such amounts as may be necessary for continuing projects or activities (not otherwise specifically provided for in this joint resolution) which were conducted in the fiscal year 1979 and for which appropriations, funds or other authority would be available in the following appropriation Acts:
>
> "Foreign Assistance and Related Programs Appropriations Act, 1980 * * *."

This appropriation is further defined as follows:

> "(2) Appropriations made by this subsection shall be available to the extent and in the manner which would be provided by the pertinent appropriation Act * * *.

* * * * *

"(4) Whenever an Act listed in this subsection has been pased by only one House as of October 1, 1979, or where an item is included in only one version of an Act as passed by both Houses as of October 1, 1979, the pertinent project or activity shall be continued under the appropriation, fund, or authority granted by the one House, but at a rate for operations not exceeding the current rate or the rate permitted by the action of the one House, whichever is lower, and under the authority and conditions provided in applicable appropriation Acts for the fiscal year 1979 * * *."

The Foreign Assistance and Related Programs Appropriation Act, 1980, H.R. 4473, 96th Congress, was passed by the House of Representatives on September 6, 1979. It was not passed by the Senate prior to October 1, 1979.

Title II of H.R. 4473, as it passed the House, contained appropriations of funds for development assistance under sections 103, 104(b), 104(c), 105, and 106 of the Foreign Assistance Act of 1951, as amended. Each of the appropriations contained the following proviso:

"*Provided*, That the amounts provided for loans to carry out the purposes of this paragraph shall remain available for obligation until September 30, 1981."

Thus, under H.R. 4473, funds appropriated for development assistance loans were to be available for two years—fiscal years 1980 and 1981.

The two-year period of availability of development assistance loan funds was incorporated into the continuing resolution either under paragraph 101(a)(2) ("to the extent and in the manner which would be provided by the pertinent appropriation act"), or under paragraph 101(a)(4)

("the pertinent project or activity shall be continued under the appropriation, fund, or authority granted by the action of the one House").

On the other hand, section 102 of the continuing resolution provides:

> "Appropriations and funds made available and authority granted pursuant to this joint resolution shall be available from November 20, 1979, and shall remain available until (a) enactment into law of an appropriation for any project or activity provided for in this joint resolution, or (b) enactment of the applicable appropriation Act by both Houses without any provision for such project or activity, or (c) September 30, 1980, whichever first occurs."

There is thus a contradiction, concerning the period of availability of these funds, between the provisions incorporated by section 101(a) and section 102 of the continuing resolution. Under section 101(a), funds appropriated for development assistance loans are to be available until September 30, 1981. Under section 102, however, all funds appropriated by the continuing resolution are to be available only until September 30, 1980.

We have long followed the principle of statutory construction that, when there is seeming conflict between a general statutory provision and a specific statutory provision, and the general provision is broad enough to include the subject matter to which the specific provision relates, the specific provision will be considered an exception to the general provision. *See, e.g.*, B-194063, May 4, 1979; B-163375, September 2, 1971. In this way, we can give effect to both provisions.

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In the present situation, section 102 of the continuing resolution applies to all the appropriations, funds, and authority made available or granted by it. The provision of H.R. 4473, incorporated into the resolution by section 101(a), applies only to funds appropriated for development assistance loans. Thus, section 102 is the general provision, and the provision under section 101(a) is the specific provision. Under the rule of statutory constructions set forth above, it follows that funds appropriated by the continuing resolution are generally available only until September 30, 1980, except for funds appropriated by title II of H.R. 4473 for development assistance loans which are specifically made available until September 30, 1981.

Question 2

Section 502 of H.R. 4473, as it passed the House of Representatives, provides:

> "Except for the appropriations entitled 'International disaster assistance' and 'United States emergency refugee and migration assistance fund', not more than 15 per centum of any appropriation item made available by this Act for fiscal year 1980 shall be obligated or reserved during the last month of availability."

A similar provision, applying to funds appropriated for fiscal year 1979 was contained in section 102 of the Foreign Assistance and Related Programs Appropriation Act, 1979, Pub. L. No. 95-481, 92 Stat. 1595.

The General Counsel specifically asks whether the limitation contained in the fiscal year 1979 appropriations act applies to funds appropriated by the fiscal year 1980 continuing resolution. His question arises because of the portion of section 101(a)(4) of the resolution which provides

that projects in an appropriations act which has passed only one House of the Congress shall be continued "* * * under the authority and conditions provided in applicable appropriation Acts for the fiscal year 1979."

We do not consider it necessary to answer the General Counsel's question as phrased, because it is our opinion that the 15 percent last-month spending limitation contained in H.R. 4473 applies to foreign assistance funds appropriated for fiscal year 1980 by the continuing resolution.

Paragraph (4) of section 101(a) of the continuing resolution contains two instructions for determining the appropriation for projects contained in an act which has passed only one House of the Congress. First, it states that these projects shall be continued

> "under the appropriation, fund, or authority granted by the one House, but at a rate for operations not exceeding the current rate or the rate permitted by the action of the one House, whichever is lower * * *."

Second; as quoted above, it provides that the project shall be continued under the authority and conditions contained in the act appropriating funds for the same program for fiscal year 1979.

We interpret these two instructions as applying to two different types of provisions, which may be contained in appropriations acts. The first applies to fiscal provisions; that is, provisions relating to the amount of the appropriation and its period of availability. The second applies to program provisions; that is, provisions controlling the purposes for which the appropriation is, or is not, available.

Under our interpretation, we look at the fiscal year 1980 appropriations act as it passed the one House to determine the fiscal provisions of the appropriation. We look to the

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corresponding fiscal year 1979 appropriations act to determine the program provisions applicable to the appropriation.

A limitation on the percentage of an appropriation that may be obligated or reserved during any particular time period is a limitation on the period of availability of the appropriation, and therefore a fiscal provision.

Under our interpretation of section 101(a)(4) of the continuing resolution, fiscal provisions contained in H.R. 4473 are incorporated into the resolution. Thus the 15 percent last-month obligation limitation contained in H.R. 4473 applies to funds appropriated by the resolution.

We conclude that, with the exceptions contained in section 502 of H.R. 4473, not more than 15 percent of the foreign assistance and related programs funds appropriated by the continuing resolution can be obligated or reserved during the last month of availability. For funds appropriated for a period of one-year, the last month of availability is September 1980. For 2-year funds, like the development assistance loans funds, the last month of availability is September 1981.

/s/ Milton J. Sokolar

For the Comptroller General
of the United States